

CHATTEN-BROWN & CARSTENS

TELEPHONE:(310) 314-8040
FACSIMILE: (310) 314-8050

3250 OCEAN PARK BOULEVARD
SUITE 300
SANTA MONICA, CALIFORNIA 90405
www.cbcearthlaw.com

E-MAIL:
JCB@CBCEARTHLAW.COM

February 6, 2006

Via E-Mail:

nepataskforce@mail.house.gov

NEPA Draft Report Comments
C/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building

Re: NEPA Recommendations

Dear NEPA Task Force:

Our firm specializes in representing environmental and community groups in cases involving land use and natural resources. Though we primarily practice in California State Court, we handle some federal litigation, including under the National Environmental Policy Act. The following are our comments on the Task Force's proposals:

Group 1 - Streamlining NEPA

Recommendation 1.1: Amend NEPA to define a project subject to NEPA as a "major federal action that would only include new and continuing projects that would require substantial planning, time, resources, or expenditures. (*Query: Is this limited to federal planning, time, resources or expenditures? What about major private actions for which the federal government has permitting authority? What if the planning is not substantial, but the expenditures are.*)

Recommendation 1.2: Amend NEPA to add mandatory timelines for the completion of NEPA documents: 18 months for completing an Environmental Impact Statement (EIS), and 9 months for an Environmental Assessment (EA). (*Comment: Fortunately, the Task Force realized that these time limits would not always be reasonable, and recommended that CEQ be given the right to approve an extension of time, but limited such an extension to 6 and 3 months, respectively. Unfortunately, for a program EIS with major implications and major unknowns such as an airport expansion project, this, too, may not be sufficient time.*)

Recommendation 1.3: Amend NEPA to create unambiguous criteria for the use of Categorical Exclusions (CEs), EAs and EISs. *(Comment: Imposing a burden of proving “compelling evidence” is unprecedented and would severely limit the public’s ability to challenge use of EAs in stark juxtaposition to California’s preference for EIRs over Mitigated Negative Declarations and the use of the “fair argument” standard. Also, many “temporary activities” may have severe environmental consequences. Is timber harvesting a temporary activity? Surely clean up and disposal of a waste site is, but it may have serious environmental consequences. The CEQ regulations already exempt “emergency” activities (40 Code of Federal Regulations section 1506.11), but short term actions should be reviewed for their environmental consequences where possible.)*

Group 2 - Enhancing Public Participation

Recommendation 2.1: Direct CEQ to prepare regulations giving weight to localized comments to give more weight to local comments than comments from outside groups and individuals who are not directly affected by that proposal. *(Comment: This proposed revision appears to be a blatant effort to reduce the impact of national and other “non-local” environmental groups in the commenting process, and is incompatible with the recognition that the public has an interest in protection of our natural resources. Comments should be based upon their substantive content, not the location of the author, though clearly local commentators may have unique insights or specialized knowledge. Further, the way the revision is written, even EPA regulators in Washington or the National Academy of Science might be devalued as an “outside group”.)*

Recommendation 2.2: Amend NEPA to codify the EIS page limits set forth in CEQ regulations, 40 CFR section 1502.7 providing an EIS shall normally be less than 150 pages with a maximum of 300 pages for complex projects. *(Comment: There is no question but that EIRs and EISs have become unnecessarily lengthy, and often filled with boiler plate rather than critical analysis. IF the technical appendices are not considered as part of the EIS for purposes of this mandate, it makes considerable sense, but if it does not, then the environmental consequences of major federal actions may not be adequately documented.)*

Group 3 - Better Involvement for State, Local and Tribal Stakeholders

Recommendation 3.2: Direct CEQ to prepare regulations that allow existing state environmental review process to satisfy NEPA requirements where the state environmental reviews are “functionally equivalent” to NEPA requirements. *(Comment: As the Task Force recognizes, there are 23 states that have “little NEPAs” of some kind, but many of them are significantly less demanding than NEPA in their application.*

California encourages the preparation of joint EIR/EISs, and it is certainly desirable to avoid duplication, when possible. However, cooperation rather than delegation best fulfills the goal of assuring that federal agencies apply their expertise, understand the environmental consequences of their actions, and that local interests do not dominate when the action has impacts on natural resources or federally funded facilities or operations.)

Group 4 - Addressing Litigation Issues

Recommendation 4.1: Amend NEPA to create a citizen suit provision that would 1) require appellants to demonstrate that the evaluation was not conducted using the best available information and science; clarify that parties must be involved throughout the process in order to have standing in an appeal; prohibit a federal agency from entering into settlements that forbid or severely limit activities for businesses that were not part of the initial lawsuit; and provides any settlement discussions should include the business and individuals that would be affected by the settlement. *(Comment: NEPA case law already requires a plaintiff to have exhausted its administrative remedies. The other recommendations appear intended to severely limit the ability of environmental protection advocates to successfully litigate under NEPA and to give industry the absolute right to participate in any settlement potentially affecting them. Interestingly, the first recommendation implies an agency must use “the best available information and science” in preparing an EIS or EA.)*

Recommendation 4.2: Establish clear guidelines on who has standing to challenge an agency decision, requiring the plaintiff to be “directly impacted”. *(Comment: Case law already establishes reasonable standing requirements, and NEPA's purposes are not well served by interjecting the requirement that a plaintiff be “directly impacted”. This could preclude a challenge to a permit to fill a wetland on private land, even though the permit would have significant indirect consequences to the public.)*

Recommendation 4.3: Require that challenges must be filed within 180 days of notice of a final decision on the federal action. *(Comment: Since there is currently no statute of limitation for NEPA actions other than the six year general federal statute, it makes some sense to have a shorter statute, but if one is imposed, it would be helpful to have it tolled or the litigation stayed during litigation of the same project under a state statute so that unnecessary and duplicative litigation can be avoided.)*

Recommendation 4.4: Amend NEPA to add a requirement that agencies “pre clear” projects with CEQ. If a judicial proceeding or agency administrative decision mandates certain requirements, CEQ would be charged with the responsibility of analyzing its effects and advising appropriate federal agencies of its applicability. *(Comment: This*

would concentrate power in the President's Council on Environmental Quality, and potentially further politicize the environmental review process, though there certainly is merit to one federal agency having oversight responsibility and making recommendations to federal agencies, and to Congress.)

Group 5 - Clarifying Alternatives Analysis

Recommendation 5.1: Amend NEPA to require that "reasonable alternatives" analyzed in NEPA documents be limited to those which are economically and technically feasible, and would not have to be considered unless they were supported by feasibility and engineering studies, and be capable of being implemented after taking into account: a) cost, b) existing technologies, and (c) socioeconomic consequences (e.g., loss of jobs and overall impact on a community). *(Comment: To add to the NEPA process the burden of having feasibility and engineering studies conducted for each alternative seems contrary to the objectives of expediting the process, and reducing costs. More importantly, it seems the intent of the proposal is to narrow the range of alternatives that would have to be studied (thus expediting the process and reducing the costs), since absent the engineering, the alternatives "would not have to be considered". To eliminate or restrict the range of alternatives analyzed in an EIS this way would eliminate one of the areas that many members of the public view as one of NEPA's strengths: its requirement for consideration of a reasonable range of alternatives so that better decisions will be made.)*

Recommendation 5.2: Amend NEPA to clarify that the alternative analysis must an extensive discussion of the "no action alternative" as opposed the current directive in 40 CFR section 1502.14, which allows the "no action alternative" to be included in the list of alternatives. *(Comment: Again, this addition seems contrary to the goal of streamlining the process. Further, limiting the discretion of the agency to take "no action" at a particular time is unsound. It is unclear whether the "impacts" to be weighted include costs, but an agency may not have adequate funding at a particular time, or wants to await action because of other contemplated federal actions. The mandate seems especially unreasonable in light of the proposed time limits on environmental review proposed by the Task Force.)*

Recommendation 5.3: Direct CEQ to promulgate regulations to make mitigation proposals mandatory and create binding commitment to proceed with the mitigation. *(Comment: This appears the one clear win for the environmentalists, but still, NEPA would not have a substantive mandate, like the California Environmental Quality Act. Instead, the regulations would only require that a promise made not be broken. A more protective proposal would be something like California Public Resources Code section 21002, stating the policy of avoiding significant impacts, and section 21081, allowing an override of significant impacts only when all feasible mitigation measures are imposed,*

or feasible alternatives adopted, and even then only based upon specific findings.)

Group 7 - Additional Authority for the Council on Environmental Quality

Recommendation 7.1: Amend NEPA to create a “NEPA Ombudsman” within the Council on Environmental Quality. *(Comment: According to the Task Force, the purpose of this position would be to provide offset the pressures put on agencies by “stakeholders” and allow the agency to focus on consideration of environment impacts of the proposed action, but, again, it appears to further politicize the process and concentrate power by putting this in CEQ, rather than having a “NEPA Ombudsman” within each federal agency. The term “stakeholders” is not defined, but the emphasis throughout the Report is on local and business interests.)*

Recommendation 7.2: Direct CEQ to control NEPA related costs by assessing NEPA costs and bringing recommendations to Congress for some cost ceiling policies. *(Comment: Ironically, some of the Task Force recommendations, such as the requirement for engineering and feasibility reports, will themselves increase costs. However, a study on limiting costs should take into account the real economic and environmental costs of failing to protect the environment. For example, when the Clean Air Act was assailed for costing too much, EPA studies showed the economic cost of emission control was far less than the health related cost of failing to act.)*

Group 8 - Clarify meaning of “cumulative impacts”

Recommendation 8.2: CEQ would be instructed to prepare regulations that would modify the existing language in 40 CFR section 1508.7 to focus analysis of future impacts on concrete proposed actions rather than actions that are “reasonably foreseeable.” *(Comment: This highly problematic recommendation would encourage segmentation of projects and put blinders on agencies about likely impacts that would result from impacts viewed in conjunction with other “reasonably foreseeable” projects.)*

Group 9 - Studies

Recommendation 9.1: The Task Force also recommends a series of studies be conducted by CEQ, including 1) NEPA’s interaction with other Federal environmental laws, and how to avoid duplication; 2) Federal agency NEPA staffing issues; NEPA’s interaction with state “little-NEPAs”, and how to eliminate or minimize duplication. *(Comment: Although it may be desirable to have further study of these issues, a study by a balanced Task Force is more likely to identify politically and environmentally acceptable changes.)*

NEPA Draft Comments c/o NEPA Task Force
February 6, 2006
Page 6

Thank you for your consideration of these views.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Chatten-Brown", with a long horizontal flourish extending to the right.

Jan Chatten-Brown